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NO. 82-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a statutorily-authorized sentence of life imprisonment, without parole but with a right of commutation, for a nonviolent habitual offender's seventh felony constitutes cruel and unusual punishment under the Eighth and Fourteenth Admendments to the United States Constitution?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix attached to the Petition for Writ of Certioriari at pp. A-1 to A-21.

The opinion of the United States District Court for the District of South Dakota appears in the supplemental appendix to the Petition for Writ of Certiorari.

The opinion of the South Dakota Supreme Court appears in the appendix attached to the Petition for Writ of Certiorari at pp. A-22 to A-40 and is also reported with the following citation: State v. Helm, 287 N.W.2d. 497 (1980).

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JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on August 4, 1982. The

Petition for Writ of Certiorari was applied for on September 20, 1982, within the time set by Rule 20.2 of the Rules of the Supreme Court. The Petition for Writ of Certiorari was granted on November 8, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusal punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person within its jurisdiction the equal protection of the laws.

The relevant portions of the South Dakota Codified Laws, SDCL 24-15-4, SDCL 22-7-8, SDCL 24-14-1, SDCL 22-6-1(2) and SDCL 24-14-5, are as follows:

> SDCL 24-15-4. A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles.
>
> SDCL 24-14-1. The Governor may, by executive order, delegate to the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.
>
> SDCL 24-14-5. The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board.
>
> SDCL 22-6-1(2). Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction;
>
> . . .

> (2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
>
> . . .
>
> SDCL 22-7-8. When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.

STATEMENT OF THE CASE

Jerry Buckley Helm pled guilty to a felony charge of uttering a no account check for one hundred ($100.00) dollars. Appendix to Petition for Certiorari [hereinafter "App. to Pet."], A-2 and A-24. Helm also admitted to being convicted of six (6) previous felonies for which "he had spent most of his adult lifetime behind bars." State v. Helm, 287 N.W.2d 497, 498 (S.D. 1980). Helm was adjudged to be an habitual offender under SDCL 22-7-8. App. to Pet., A-2 and A-24.

Following entry of his guilty plea, Helm waived his right to a presentence investigation

and requested immediate sentencing. App. to Pet., A-3 and A-24 to A-25. Helm was sentenced to life imprisonment in the state penitentiary. App. to Pet., A-25.

The statute in effect at the time of Helm's sentencing provided that "[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." SDCL 24-15-4. App. to Pet., A-5. Thus, by imposing a life sentence, the sentencing judge committed Helm to the state penitentiary for the remainder of his natural life, barring a pardon or commutation of his sentence.

Helm appealed from his sentence, contending that the imposition of a sentence of life imprisonment without parole constituted cruel and unusual punishment. The Supreme Court of South Dakota affirmed the judgment of the trial court. State v. Helm, supra. App. to Pet., A-6.

Helm then petitioned for a writ of habeas corpus in federal district court alleging that his

sentence constituted cruel and unusual punishment. The United States District Court for the District of South Dakota, Western Division, exercising its jurisdiction pursuant to 28 U.S.C. § 2241(d), held that Helm had effectively waived any right to a presentence investigation, and that Rummel v. Estelle, 445 U.S. 263 (1980), disposed of Helm's claim that the sentence imposed constituted cruel and unusual punishment. App. to Pet., A-6 to A-7.

Helm then appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. § 2253. App. to Pet., A-7. At oral argument before the Eighth Circuit panel, the State of South Dakota was requested to provide the Court with statistical evidence concerning the results of commutation requests from prisoners serving life sentences in the South Dakota state penitentiary. Those statistics were provided the Court (JA 20),

and indicated that twenty-two (22) prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. During the same time period, commutation requests from 12 prisoners were denied. Moreover, since 1975, the Governors of the State of South Dakota have commuted no life sentences but have denied requests for commutation of life sentences from twenty-five (25) prisoners (the above twelve (12) plus thirteen (13) more), including Helm. In sum, during the total time period for which statistics were made available, twenty-two (22) life sentences were commuted while twenty-five (25) life sentences were not. App. to Pet., A-41-A-47, and A-49.

Following oral argument, the Eighth Circuit panel reversed and remanded Helm's sentence "with directions to issue the writ if, within sixty (60) days following the issuance of our mandate, the State has not resentenced Helm." App. to Pet., A-21.

The State then petitioned this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The United States Supreme Court has unambiguously established the constitutional standard to be applied to Eighth Amendment challenges like the present one, and the lower federal courts must be required to obey.

The established standard is that if: (1) the sentence is not death, (2) the sentence does not include any cruel "accompaniments," and (3) the charged criminal acts are "concededly classified and classifiable as felonies," any statutorily authorized period of incarceration is constitutionally permissible. In other words:

> Given the unique nature of the punishments considered in Weems and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence imposed is purely a matter of legislative prerogative.

Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 391, 100 S.Ct. 1133 (1980). See also Hutto v. Davis, 30 Cr.L. 4159.

Insofar as Helm's sentence is not death, does not include "accompaniments," and is the product of criminal acts concededly classified and classifiable as felonies, Rummel is dispositive of Helm's constitutional claim.

Alternatively, Rummel disposes of Helm's claim because Helm's sentence is the product of his guilty plea to an habitual offender charge. As the dissenters noted in Hutto v. Davis, supra at p. 4162:

> Rummel rests on the understanding that, as a consequence of the overwhelming state interests in deterring habitual offenders, the Eighth Amendment does not preclude a state from imposing what might otherwise constitute a disproportionate prison sentence on an individual determined under state law to be a habitual offender. (Emphasis added.)

Finally, assuming, arguendo, that a proportionality analysis (Coker v. Georgia, 433 U.S.

584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977) is applicable to Helm's case, the State contends that a discretionary sentence of life imprisonment, without parole but with a right of commutation, for a convicted habitual offender with six (6) prior felony convictions is proportional.

ARGUMENTS AND AUTHORITIES

A STATUTORILY-AUTHORIZED SENTENCE OF LIFE IMPRISONMENT, WITHOUT PAROLE BUT WITH A RIGHT OF COMMUTATION, FOR A NONVIOLENT HABITUAL OFFENDER'S SEVENTH FELONY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH ADMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Life is not death.

In Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980), a Texas felon who had been previously convicted of "fraudulent use of a credit card to obtain $80 worth of goods for services" and "passing a forged check in the amount of $28.36" was convicted of obtaining $120.74 by false pretenses.

Upon conviction, Rummel, because of his two prior felony convictions and the prosecutor's decision to charge him as a recidivist, was given the life sentence mandated by Texas law.

Rummel subsequently challenged his life sentence as cruel and unusual punishment prohibited by the United States Constitution.

After argument, this Court ruled that Rummel's sentence was not prohibited cruel and unusual punishment within the meaning of the United States Constitution. In its analysis, the Court noted that it had on occasion found sentences "grossly disproportionate to the severity of the crime." Rummel, at p. 389. However, the Court further noted that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare," At p. 390. After an exhaustive review of the case law, the Court then concluded as follows:

> Given the unique nature of the punishments considered in Weems and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence imposed is purely a matter of legislative prerogative.

At p. 391.

However, the Eighth Circuit panel, in its Helm opinion (see App. to Pet., at A-12 to A-13), ruled that Rummel is inapplicable to Helm's case because under the Texas statute, Rummel was eligible for parole whereas Helm is not eligible for parole as a matter of South Dakota law. SDCL § 24-15-4. The Eighth Circuit opinion rests on the assumption that for Eighth Amendment purposes, there are three categories of sentences--life with parole, life without parole, and death. App. to Pet., at A-13.

This novel theory, created from whole cloth, is, of course, necessary to the Eighth Circuit's

claim that Rummel is not dispositive of Helm's appeal. However, this novel theory does not comport with this Court's analysis in Rummel. As stated by the Rummel Court:

> Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel. (Emphasis added.)

At p. 390.

Moreover, this Court in its per curiam opinion in Hutto v. Davis, 30 Cr.L. 4159, analyzed Rummel and concluded:

> In rejecting that argument, we distinguished between punishments--such as the death penalty--which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration. (Emphasis added.)

It is, therefore, the State's position that the Eighth Circuit's opinion is not consistent with Rummel, as Rummel is understood by its authors,

the United States Supreme Court. Nor is it consistent with this Court's death penalty cases wherein it is stated that the rejection of some death statutes as cruel and unusual punishment "rested on the predicate that the penalty of death is qualitatively different from any other sentence." Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 989, 98 S.Ct. 2954 (1978). See also Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 401, 97 S.Ct. 1197 (1977).

Therefore, the State of South Dakota respectfully requests that this Court reject the Eighth Circuit's analysis as contrary to the analytical framework previously adopted by the United States Supreme Court. The State's request is especially meritorious in view of the fact that under the Eighth Circuit's analysis, death and life without parole are treated identically for Eighth Amendment purposes--that is, both are subject to proportionality analysis. Thus, the

Eighth Circuit has improperly equated life without parole and death.

B. Rummel's Footnote 11.

A second method by which the Eighth Circuit Court of Appeals attempts to justify its Eighth Amendment analysis is to note that the Rummel opinion admits that the "proportionality principle would come into play in an imprisonment sentence in extreme cases," citing p. 391, n. 11 which states the example of a legislature making "overtime parking a felony punishable by life imprisonment." The Eighth Circuit's point is also made by the dissenters in Hutto v. Davis, supra at p. 4161. However, as those same dissenters admit, "the per curiam suggests that because the punishment imposed on respondent was within the maximum prescribed by the state legislature, the Court of Appeals, which affirmed the District Court's grant of habeas relief on Eighth Amendment grounds, sanctioned an intrusion into the basic line-drawing province of legislatures, not

courts." The dissenters conclude that "by suggesting that it was improper for the courts below to engage in a disproportionality analysis, [the per curiam decision] represents a serious and improper expansion of Rummel." At p. 4161. The State is willing to accept the dissenters conclusion that the majority decision in Hutto v. Davis stands for the proposition that proportionality analysis is inapplicable to non-capitol punishment cases.

However, the State of South Dakota does not believe that the majority opinions in Rummel v. Estelle and Hutto v. Davis necessarily go so far. The language of Rummel setting forth the constitutional standard to be applied to Eighth Amendment challenges is consistent with the Rummel Court's overtime parking example. Again, the constitutional standard is:

> Given the unique nature of the punishment considered in Weems and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes

> concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence imposed is purely a matter of legislative prerogative. (Emphasis added).

Rummel, at p. 391. Clearly, the Rummel Court has created an exception to its nonintervention rule. If a crime is not concededly (1) "classified" and (2) "classifiable" as a felony, proportionality analysis may allow a sentence to be declared cruel and unusual.

With respect to overtime parking, the State of South Dakota is unaware of any state of the United States which has "classified" overtime parking as a felony. Furthermore, even if overtime parking were declared by some state to be a felony, the State of South Dakota believes that it would be generally agreed that overtime parking is not "concededly . . . classifiable" as a felony. Thus, overtime parking does not satisfy either the "classified" or "classifiable" requirements of Rummel.

In Helm's case, it is unchallenged that the writing of a no-account check is a felony in South Dakota ("classified"), and it is unchallenged that the writing of a no-account check rises to the level of a felony ("classifiable"). As a result, Helm's facts do not qualify under the Rummel exception.

In sum, the State of South Dakota respectfully requests that this Court reject others' attempts to use the Rummel overtime parking example to create cavernous exceptions to the Rummel rule.

C. The proportionality principle is not applicable to Helm's sentence.

Notwithstanding Rummel, the Eighth Circuit persists, however, by arguing that the proportionality test expressed by the Court in Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977) is applicable to Helm's case.

In response, the State notes that Coker is a death penalty case and, therefore, irrelevant to Helm's sentence.

Moreover, the Eighth Circuit's Coker review of "the sentence imposed for commission of the same crime in other jurisdictions" is inapplicable because according to Rummel and Hutto v. Davis, supra at p. 4159, n. 2, this Court has rejected such comparisons, stating that "absent a constitutionally imposed uniformity, inimical to traditional notions of federalism, some states will always bear the distinction of treating particular offenders more severely than in any other state."

With respect to the Coker test of "the sentence imposed upon other criminals in the same jurisdiction," this Court has held "[t]his comparison was rejected in Rummel because other crimes implicate other societal interests, making any such comparison inherently speculative." Hutto v. Davis, supra at p. 4159, n. 2.

D. Helm's sentence is proportional.

With respect to the Coker test of "the nature of the offense," the State contends that Helm's seven felony convictions and incarceration for

most of his adult life necessitates the conclusion that the criminal behavior for which Helm was sentenced in the instant case constitutes "serious" criminal activity. Notwithstanding the Eighth Circuit's categorization of Helm's crimes as non-violent, the State notes that while Helm is not a murderer or a rapist, he is an unrepentant thief.

Moreover, it cannot go without special emphasis that Helm is an admitted habitual offender. And as stated in Hutto v. Davis, supra at p. 4162:

> Rummel rests on the understanding that, as a consequence of the overwhelming state interests in deterring habitual offenders, the Eighth Amendment does not preclude a state from imposing what might otherwise constitute a disproportionate prison sentence on an individual determined under state law to be a habitual offender. (Emphasis added.)

The State, therefore, concludes that Helm's sentence is proportional.

E. The effect of "without parole."

Notwithstanding the foregoing realities, the Eighth Circuit distinguishes Helm's sentence (life

without parole) from Rummel's (life with parole) and claims that the difference is constitutionally significant.

In response, the State contends that a life sentence is a life sentence whether or not a state statute authorizes parole. Parole is a collateral event which occurs long after the pronouncement of a life sentence. Furthermore, parole is a mere possibility and is no more guaranteed than a gubernatorial commutation. As a result, the possibility of parole is not constitutionally significant.

Morever, the Eighth Circuit's attempt to elevate parole to a position of prominence in the present analysis to suggest that Helm's sentence is more severe than Rummel's ignores the following facts:

1. South Dakota law also contains the following statutes:

> SDCL 24-14-1 provides: 'The Governor may, by executive order, delegate to the board of pardons and paroles the

> the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.'
>
> SDCL 24-14-5 provides: 'The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board.'

Therefore, the possibility of commutation of Petitoner's life sentence narrows any alleged discrepancies between the South Dakota law and the Texas statute interpreted in Rummel. The fact that nearly half of all life sentences given in the past twenty years have been commuted testifies to the availability of commutation in South Dakota.

2. Rummel's life sentence was mandatory whereas Helm's life sentence is discretionary. See SDCL § 22-6-1(2) reading as follows:

> Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished

> from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction;
>
> . . .
>
> (2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
>
> . . . (Emphasis added.)

3. The South Dakota habitual offender statute under which Helm was sentenced required three prior convictions whereas the Texas statute in Rummel only required two.

> When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.

SDCL § 22-7-8.

Finally, to the Eighth Circuit's further assertion that Rummel's eligibility for parole was the crucial factor upholding his sentence, the State responds that the fact of parole was merely an illustration of the complexities involved in

Rummel's proposed interjurisdictional analysis. Rummel, at p. 395. Another factor of equal importance to the Court was "the role of prosecutorial discretion in any recidivist scheme." Rummel, at p. 395. And after review of those factors, the Rummel Court, at pp. 395-396, held as follows:

> Even if we were to assume that the statute employed against Rummel was the most stringent found in the 50 states, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other states. As Mr. Justice Holmes noted in his dissenting opinion in Lochner v. New York, 198 U.S. 45, 49 L.Ed. 937, 25 S.Ct. 539 (1905), our Constitution 'is made for people of fundamentally different views . . . .'

CONCLUSION

Within the parameters set forth in Rummel v. Estelle and Hutto v. Davis, Helm's sentence of life imprisonment, without parole but with a right of commutation, is constitutionally permissible under the Eighth and Fourteenth Amendments to the United States Constitution.

Therefore, the State of South Dakota respectfully requests that this Court reverse the Judgment of the Eighth Circuit Court of Appeals and find that Helm's sentence does not violate the United States Constitution.

Respectfully submitted,

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